



Insights: Alerts

Update: Department of Labor Releases Additional FFCRA Guidance

March 27, 2020

Written by **Diane L. Prucino** and **Susan W. Pangborn**

Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main [COVID-19 Task Force](#) page and/or your email for updates.

As we wrote about earlier this week ([here](#)), on Tuesday, March 24, the U.S. Department of Labor (“DOL”) issued guidance regarding the Families First Coronavirus Response Act (“FFCRA” or “the Act”) in three parts: a [Fact Sheet for Employees](#), a [Fact Sheet for Employers](#), and a [Frequently Asked Questions](#) document. Late in the evening on Thursday, March 26, the DOL supplemented that guidance by adding twenty-three new “Frequently Asked Questions” (numbers 15-37). The DOL also issued a separate set of “Frequently Asked Questions” related to the notice posting requirements of the FFCRA. Collectively, the guidance is aimed at helping employees and employers understand their rights and responsibilities under the Emergency Family and Medical Leave Expansion Act (“FMLA Expansion Act”) and Emergency Paid Sick Leave Act (“EPSL Act”) provisions of the FFCRA.

The DOL's guidance was largely consistent with Kilpatrick Townsend's prior interpretation available [here](#). Below we highlight key new provisions from the DOL's updated guidance:

- **Record Keeping.** According to the DOL guidance, employers must require employees to provide documentation when they take paid sick leave under the EPSL Act and the FMLA Expansion Act. (FAQs 15-16).
 - **EPSL Act Documentation.** Under the EPSL Act, the DOL guidance states that employers “must require” employees to provide: (1) their name; (2) the qualifying reason for requesting leave; (3) a statement that the employee is unable to work, including telework, based on that reason; and, (4) the date(s) for which the leave is requested. Additionally, documentation of the reason for the leave will also be necessary, which includes “the source of any quarantine or isolation order, or the name of the health care provider who has advised [the employee] to self-quarantine.” This documentation could include “a copy of the Federal, State or local quarantine or isolation order related to COVID-19 applicable to the employee or written documentation by a health care provider advising the employee to self-quarantine due to concerns related to COVID-19.”

- **FMLA Expansion Act Documentation.** Similarly, if an employee takes leave under the FMLA Expansion Act, employers “must require” employees to provide appropriate documentation, “just as [employers] would for conventional FMLA leave requests.” The DOL guidance states that this could include “a notice that has been posted on a government, school, or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care, or child care provider.” The DOL further notes that “[t]his requirement also applies when the first two weeks of unpaid leave run concurrently with paid sick leave taken for the same reason.”

The DOL also notes (in FAQ 16) that: “all existing certification requirements under the FMLA remain in effect if [an employee is] taking leave for one of the existing qualifying reasons under the FMLA.” The DOL provides the example that, if an employee takes leave beyond the two weeks of emergency paid sick leave, because his/her medical condition for COVID-19-related reasons rises to the level of a serious health condition, the employee must continue to provide medical certifications under the FMLA as required by employer policy.

Without stating it explicitly, the DOL implies that this documentation will be required for employers to claim tax credits under the FFCRA.

- **Teleworking.** In short, employees may only telework when the employer “permits or allows” the employee to do so (FAQ 17), and clarifies that an employee is unable to work or telework when the employer has work for the employee to perform, but, because of the COVID-19 qualifying reasons in the Act, the employee cannot perform the work either “under normal circumstances” at the “normal worksite” or “by means of telework” (FAQ 18). The guidance is clear that if an employee becomes unable to work or telework because of the COVID-19 qualifying reason, then he or she will then become eligible for leave under the EPSL Act and/or the FMLA Expansion Act (FAQ 19).
- **Intermittent Leave While Teleworking.** Intermittent leave will be allowed while an employee teleworks, if the “employer allows it” and the employee is “unable to telework [his/her] normal schedule of hours due to one of the qualifying reasons” in the EPSL Act and/or FMLA Expansion Act. The DOL says that employees and employers “may agree” to allow employees to take intermittent EPSL or leave under the FMLA Expansion Act. The DOL states that employees “may take intermittent leave in any increment” so long as the employer and employee agree. Further, the DOL “encourages employers and employees to collaborate to achieve flexibility and meet mutual needs, and the Department is supportive of such voluntary arrangements that combine telework and intermittent leave.” (FAQ 20).

Notably, this differs from previous analysis of the Act’s text, because the EPSL Act explicitly states that paid sick time “shall cease beginning with the employee’s next scheduled workshift immediately following the termination of the need for paid sick time” under the qualifying reasons.

- **Intermittent Leave while Working at “Usual” Worksite.** The DOL states that intermittent leave for non-teleworking employees will depend on (1) why the employee is taking the leave and (2) whether the employer agrees. (FAQ 21). Unless an employee is teleworking, “paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments” and “cannot be taken intermittently” when the

leave is taken for COVID-19 related reasons due to a Federal, State, or local quarantine or isolation order; the employee has been advised to self-quarantine; the employee is experiencing symptoms and is seeking medical care; the employee is caring for someone subject to a quarantine or isolation order, or who has been advised to self-quarantine; and/or, the employee is experiencing other “substantially similar condition[s] specified by the Secretary of Health and Human Services.” The DOL is clear that, once an employee starts taking leave for one of these reasons – and is not teleworking – the employee must continue to take paid sick leave each day until (1) the available leave is exhausted; or, (2) the employee no longer has a qualifying reason to take the leave. Notably, the DOL leaves open that an employee may use the pool of available leave open to take at a later date, so long as they take the leave for a qualifying reason before it expires on December 31, 2020.

Finally, because the DOL “encourages employers and employees to collaborate to achieve maximum flexibility,” it is, therefore, “supportive of” voluntary agreements that allow employees to take intermittent leave in order to provide qualifying care for a minor child under the Act. The DOL is explicit, however, that this leave may only be taken intermittently for non-teleworking employees when the employer gives its permission. (FAQ 22).

- **Leave is Not Retroactive.** If an employer closes or sends employees home prior to the Act's effective date of April 1 – either due to a lack of work for employees or because it is required to close pursuant to a Federal, State, or local directive – employees are not entitled to paid sick leave or the leave allotted under the FMLA Expansion Act. However, these employees may be eligible for unemployment benefits. (FAQ 23).
- **Leave is Not Available After an Employer Closes its Worksite or Because it Furloughs an Employee, or Reduces Hours.** Notably, the DOL guidance also states that if an employer closes their worksites on April 1 or “after the FFCRA's effective date,” employees “will not get paid sick leave or expanded family and medical leave.” (FAQ 24). Similarly, if an employer closes its worksite while an employee is on leave under the Act, the employee is only entitled to pay for the period where the worksite was open. (FAQ 25). The DOL Guidance is clear – once a worksite closes (and teleworking is not an option), the employer is not required to keep paying for an employee's qualifying leave under the Act. This is also true if an employee is “furloughed” on or after April 1 due to a lack of business or work, or if the employee's hours are reduced for the same reasons. (FAQs 26-28). It does not matter whether the employer states an intent to reopen at some time in the future. (FAQ 27). However, employees in these situations are likely eligible for unemployment benefits. (FAQs 24-28).
- **Benefits During Periods of Leave.** If an employer offers group health coverage, and an employee elected those benefits, the employee is entitled to those benefits during leave taken under the FMLA Expansion Act and the EPSL Act. (FAQ 30).
- **Relationship to Voluntary Paid Time Off Policies.** Leave cannot be taken simultaneously under an employer's voluntary PTO policies unless the employee asks to do so and the employer agrees. (FAQs 31-33). Employers may not require employees to take voluntary leave before taking emergency paid sick

leave or FMLA expansion leave (FAQ 33); however, employees may choose to do so, if they want to utilize voluntary leave to receive full pay rather than 2/3 pay under the Act. (FAQs 31-33).

As with all things COVID-19 related, the situation is rapidly evolving with near constant changes and updates. Accordingly, will continue to monitor the situation and report through our [Task Force](#), [insights](#), [webinars](#), and other client communication.

Related People



Diane L. Prucino

t 404.815.6479

dprucino@ktslaw.com



Susan W. Pangborn

t 404.815.6305

spangborn@ktslaw.com